



## **Impact Assessment Institute**

The Institute for Impact Assessment and Scientific Advice on Policy and Legislation

***"Impartial Analysis for Policy Making"***

**Study scrutinising the**

**"IMPACT ASSESSMENT**

**Accompanying the document**

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF  
THE COUNCIL on a framework for the free flow of non-personal data in  
the European Union**

**{SWD(2017) 304 final}**

## Main Findings

The European Commission's proposal for a Framework for a Free Flow of Non-Personal Data in the European Union is presented as a key step for the EU's emerging Digital Single Market potential.

Detailed scrutiny of the Impact Assessment and related documents shows that the available evidence is sufficient to support the proposed legislative framework for Free Flow of Data. However there are a number of shortcomings in parts of the Impact Assessment and in its methodology that distract from the relevant content.

The following significant observations can be made:

- The available evidence arrives at a rationale for EU action on the identified problem areas and is sufficient to support the principles-based legislative policy option presented by the Commission proposal;
- The identified impacts are mainly qualitative and are acknowledged as such, with additional quantitative analysis that indicates an economic benefit from the preferred policy option;
- In certain cases the evidence is complemented with unsubstantiated assertions and speculative calculations, that add no value to the analysis;
- The Impact Assessment presents adequate arguments addressing stakeholders concerns on lifting of localisation requirements, although in making these arguments its language is not fully objective;
- Definitions of key terms "non-personal data" and "portability" are available but not transparently referenced, impairing clarity of the assessment;
- The presentation of stakeholder views is often misrepresentative of the results of the public consultation. Claims are said to be 'corroborated' by these results without providing concrete data;
- The "no-change" policy option was not adequately evaluated and characterised, limiting its use for comparing the assessed policy options;
- The multi-criteria comparison of the policy options lacks a coherent methodology and execution, in particular by not weighting the assessment criteria.

In this impact assessment, the preferred policy option is accompanied by adequate supporting data, but some of the supplementary content is inconsistent and superfluous, resulting in a weak presentation of the case.

## Visualisation

The following table provides a visual overview of the results of this report for each element of the evidence presented in the Impact Assessment, using an assessment from 1 to 7 to indicate the level of confidence (1 = highest, 7 = lowest confidence level).

Element	Assessment level & description (1...7)	Notes
Rhetoric	4 Concerns identified with analysis and/or evidence	The language used in setting the scope for the Impact Assessment is mostly neutral. Throughout the text there are cases of rhetorical arguments put forward without substantiation.
Assumptions	4 Concerns identified with analysis and/or evidence	The relevant assumptions are well-referenced and in the main sound, but on occasion, major trends and consequences are drawn from isolated examples, without explicit evidence. The definitions of two key terms are not transparent.
Background data	4 Concerns identified with analysis and/or evidence	The data are adequate to provide relevant evidence but some are of varying quality. The presentation of the results of the public consultation is not consistent. The views of interested parties are sometimes not presented in a balanced manner.
Analysis	4 Concerns identified with analysis and/or evidence	The Impact Assessment presents well-reasoned analysis for many of the impacts, but on occasion exhibits errors in making logical connections. The policy options are not all given the same attention and level of analysis. In certain cases the practical implications of policy options is left unclear.
Results	4 Concerns identified on analysis and/or evidence	The presented evidence is sufficient to support the results of the assessment. However, the methodology used for the comparison of policy options is incoherent and lacks robustness.
Conclusions	2 Minor questions identified on analysis and/or evidence	The conclusions of the Impact Assessment reflect the evidence presented in it and the translation of the results of the Impact Assessment to the legislative proposal is coherent.

### Key to assessment levels

1	2	3	4	5	6	7
Correct analysis, fully evidenced	Minor questions identified on analysis and/or evidence	Several questions identified on analysis and/or evidence	Concerns identified with analysis and/or evidence	Substantial concerns identified with analysis and/or evidence	Serious concerns identified with analysis and/or evidence	Incorrect analysis / evidence absent

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## 1 Introduction

The European Commission's Digital Single Market Strategy was adopted in a 2015 Communication and was divided into three pillars:

- Better online access for consumers and businesses across Europe;
- Creating the right conditions and a level playing field for advanced digital networks and innovative services;
- Maximising the growth potential of the Digital Economy.

As part of building a stronger data economy, the European Commission flagged in its communication a 'European Free Flow of Data' initiative as a means to address the free movement of non-personal data and unjustified restrictions on the location of data for storage or processing purposes.

The proposal for a Regulation on a Framework for the free flow of non-personal data was published on 13 September 2017, along with an Impact Assessment. The general policy objective is to achieve a more competitive and integrated internal market for data storage and other processing services and activities.

This Impact Assessment Institute study scrutinises the evidence presented for the Free Flow of Data Initiative, primarily found within the following European Commission documents and a number of referenced studies:

- Proposal for a Regulation of The European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union;
- Impact Assessment and Annexes accompanying the proposal (SWD (2017) 304);
- Synopsis Report of the Consultation on the 'Building A European Data Economy' Initiative;

The above documents have been scrutinised on the basis that they should be consistent, present sufficient detail for full understanding of the results, allow reconciliation of results by stakeholders and enable full comparison of different options and scenarios.

### 1.1 Regulatory Scrutiny Board opinion and decision to proceed

It should be noted that the Impact Assessment received two negative opinions from the Regulatory Scrutiny Board. In its second opinion, the Board stated "*the lead DG should seek the appropriate political guidance on whether and under what conditions this initiative may proceed further.*" If a decision is made by the Commission to proceed with a piece of legislation that has not received a positive opinion, this should be fully legitimised by the College and should be fully explained in the proposal, in particular detailing why the imperative to proceed overrides the identified shortcomings in the evidence.

Section 3 of the legislative proposal includes an explanation of the reasoning for proceeding with the initiative despite the two negative opinions from the Board. The arguments provided are relevant, indicating the requisite political guidance was provided. Further, Annex 1 to the Impact Assessment states that a number of shortcomings identified by the Regulatory Scrutiny Board have been addressed in the final published version. However, this study has found similar as well as additional issues in the final Impact Assessment, indicating that the concerns expressed have not been fully resolved.

## 1.2 Definition of non-personal data

Of fundamental importance to this Impact Assessment and legislative proposal is the definition of its key term, non-personal data. The term is properly defined in the legislative proposal by reference to the General Data Protection Regulation (GDPR)<sup>1</sup>. However, the definition is not explicitly referenced in the Impact Assessment. It is implied by the reference to the GDPR on page 3, indicating an assumption that the definition is well-known. As an explanatory document the Impact Assessment should include a clear and explicit definition of the term in primary focus, to provide a comprehensive coherent explanation for the reader.

## 2 Justification

### 2.1 Problem definition

The Impact Assessment on the Free Flow of Non-Personal Data identified four problems, whose definitions are analysed in the table below:

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<b>Cluster 1:</b> Obstacles to the movement of data across borders within the EU	
➤	<b>Problem 1.</b> Legislative and administrative restrictions imposed by Member States (both rules and practices)
➤	<b>Problem 2.</b> Legal uncertainty stemming from the perceived existence of data localisation requirements by businesses as well as public sector organisations and authorities and from complex EU legal framing
➤	<b>Problem 3.</b> Lack of trust displayed by public authorities (concerned about data availability for regulatory control / data sovereignty) and businesses or public-sector organisations - users of data storage / processing services (concerned about the level of security of data storage and processing outside their own Member State)
<b>Cluster 2:</b> Obstacles to movement of data across IT-systems	
➤	<b>Problem 4.</b> Vendor lock-in phenomenon driven in practice by the lack of clear contractual rules and practices concerning switching providers / porting data to a new provider or back to own IT systems; inefficient use of standards; as well as technical issues (e.g. data formats)

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In the following table, the elements of the problem definition (Part 2) and description of the drivers (Annex 5), are assessed according to the steps laid out in the Better Regulation Toolbox.

Steps to be completed in the problem definition <sup>2</sup>	Assessment of the problem definition in the Impact Assessment
A. Establish <b>what the problem is and why it is</b>	The problems are established with clear indications as to why they are problematic in the context of the legislative proposal. The problem of legal uncertainty is well elaborated.

<sup>1</sup> Regulation (EU) 2016/679

<sup>2</sup> Revised Better Regulation Toolbox p. 82-85, European Commission, September 2017.

<p><b>problematic</b> (i.e. its negative consequences)</p>	<p>However, there are a few minor concerns found within the elaboration of the problems.</p> <p>Firstly, some definitions are unclear. Portability is mentioned as a partial reason for the legislative proposal, but it is only properly defined in the Annex of the Impact Assessment (page 64) without a reference to guide the reader. The Impact Assessment also uses “Switching” as a term to differentiate from the principle of data portability as introduced in the GDPR but again only makes this distinction clear in the Annex without reference from the main text (page 65).</p> <p>Secondly, data on factors limiting enterprise use of cloud services (Figure 2 in the Impact Assessment / Figure 5 in the Annex), which is used to establish Problem 2: Legal Uncertainty, does not indicate the sample size of the large or small and medium size enterprises who perceive factors limiting the use of cloud service. Upon closer inspection, the source data for the survey is unavailable via the cited source (Eurostat).</p> <p>Overall, the Impact Assessment presents evidence that demonstrates the existence of the identified problem, but the language and explanation are not fully coherent.</p>
<p>B. Assess the magnitude and <b>EU dimension</b> of the problem</p>	<p>Evidence is given to indicate an EU dimension of the problem and defines a magnitude in terms of opportunity costs if no action is taken.</p> <p>The Impact Assessment cites the loss in growth and innovation potential of start-ups and scale-ups as being high, but does not provide figures beyond broad macroeconomic conjecture to demonstrate this loss.</p> <p>It also states that <i>“this problem also confronts other SMEs, which in total account for nearly 60% of European GDP and 65% of European employment. Any impact on them would therefore have large implications for the EU economy.”</i> However, the proportion of SMEs that would be affected by the problem is not addressed. Therefore the EU dimension of the problem is demonstrated qualitatively but substantive data is not provided.</p> <p>On page 12, the Impact Assessment provides a hypothetical cost scenario for SMEs using private cloud services. However, the origin of the assumptions used are not explained. In particular the study assumes that SMEs store 50 TB on average, yet does not provide any reference for this figure. It also does not take into account the likelihood of data requirements growing significantly over time. One of the links to pricing data is no longer functioning and no price corresponding to “high cost location” can be found. The relevant data should have</p>

	<p>been presented in the Impact Assessment. Additionally, the example makes a simple mathematical error<sup>3</sup>.</p> <p>The Impact Assessment shows qualitatively that the problem has an EU dimension, but does not fully quantify and explain its magnitude beyond broad projected trends.</p>
<p>C. Establish the causes ("drivers") and assess their relative importance (Part 2.3.1 and Annex 5)</p>	<p>Driver 1 on Legislative and Administrative Rules assesses measures applied by Member States as unjustified or disproportionate using a set of criteria. It presents relevant data from two studies focusing on Member States and from the public consultation. It also provides some illustrative examples. These data appear to demonstrate the existence of the driver as presented.</p> <p>The 2<sup>nd</sup> criterion looks at the non-critical nature of the concerned data, yet does not explicitly define the difference between critical and non-critical data, even though the meaning can be inferred from the text.</p> <p>Driver 2 briefly describes the factors behind legal uncertainty regarding the use of cloud services, quoting the results of a Eurostat study from 2014. Whilst the presented data indicates the existence of such uncertainty for enterprises, newer data would have been necessary to provide a more accurate picture of the issue and examples would have helped to illustrate how the problem is manifested.</p>

<sup>3</sup> 0.0224/GB x 50TB = €1,120 not €1,010

	<p>Driver 3 presents arguments and evidence from studies on the perception of data localisation requirements. The evidence indicates the existence of the problem, by presenting and referring to testimonies and one specific example. However the magnitude of the problem is not presented and this would have been necessary in order to substantiate more clearly its extent and therefore the measures necessary to address it.</p> <p>Driver 4 on complex EU legal framing presents coherent arguments and evidence on how data localisation restrictions would be excluded from the relevant EU directives.</p> <p>Driver 5 presents a secondary motivation behind certain data localisation measures as a means of keeping data out of other jurisdictions and limiting the access of other governments to specific types of data. It refers to relevant studies and provides one example where localisation requirements have been lifted without detrimental effects. However, this section does not connect the driver to the overarching problem of a “lack of trust” nor does it explicitly illustrate why such a motivation leads to negative consequences.</p> <p>Driver 6 on Cyber security concerns, comparability of security levels, uses the example of the “<i>WannaCry ransomware attack of May 2017</i>” as an analogy for the importance of security over location. However, the attack predominately targeted individual computers using older operating systems (Windows 7) – the analogy does not establish a clear link with the security needs of Data-Storage and Data-Processing Services.</p> <p>Driver 7 on data formats, transfer modalities and Driver 8 on portability provide a detailed explanation of the relevant issues. The explanations are almost exclusively qualitative, whereby for portability a figure for GDP gains of up to €8bn per year are quoted from the 2017 Digital Economy and Society Index study. This appears to be a well-founded estimate.</p> <p>The drivers demonstrate a causal link to the identified problems, but there are some shortcomings in the mostly qualitative descriptions.</p>
<p>D. Identify who the <b>relevant stakeholders</b> are</p>	<p>Annex 3 provides an extensive mapping of the stakeholders affected by the regulation, which appears to be comprehensive.</p>
<p>E. Describe how the problem is likely to evolve with <b>no new EU intervention</b></p>	<p>While there is some analysis pointing to current opportunity costs, the “<i>loss in growth and innovation potential</i>” for instance is cited as a direct consequence, however it is not estimated or measured in a meaningful way. The evolution of the problem is not explicitly explored in the problem definition section. The Impact Assessment does later cite the possibility of the development of an uneven legislative landscape across EU</p>

	Member States in the case of no EU action. The evolution of the problem is therefore not adequately described.
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Table 1: Assessment of the problem definition, following the structure of the Better Regulation toolbox

Overall, the problem definition in the Impact Assessment does show that there is an issue that would benefit from solutions at the EU level. It demonstrates the existence of drivers that cause the problem, identifies affected stakeholders and provides some description of how the problem could evolve if not addressed. In some instances, a lack of quantifiable data weakens the message.

## 2.2 Legal basis

The legal basis and subsidiarity checks are presented under Section 3 of the Impact Assessment. As stated in the Better Regulation Toolbox, *“the choice of legal basis must be based upon the nature of the main/predominant objective”*. In this case, the proposal is based on Article 114 of the TFEU.

Article 114 of the TFEU provides that the co-legislators have a shared competence with Member States concerning the achievement of the single market. The choice for this legal basis is related to the aim of achieving *“a more competitive and integrated internal market for data storage and other processing services by ensuring the free movement of data within the Union. It lays down rules relating to data localisation requirements, the availability of data to competent authorities and data porting for professional users.”*

This legal basis appears to be relevant in view of the problem definition that is identified.

## 2.3 Subsidiarity

By choosing Article 114 of the TFEU as a legal basis the Commission is required to characterise the market onto which the proposal would apply, which it does in the Impact Assessment by setting the context of the data flows and data economy.

According to the Better Regulation Toolbox, on page 21:

*“The nature of the particular market should, therefore, be characterised in terms of the market participants, the **extent of cross-border trade**, presence/market share of companies from other Member States, **territorial restraints on trade**, share of foreign workers, **ease of cross-border purchasing**, rules related to the use/movement of capital, etc;”*

The Impact Assessment adequately highlights the need for EU-wide principals and action within this context by pointing out fragmentation that comes from uni- or multilateral action on the part of the Member States. It explains that Member State-led action is possible, but it could develop *“to different extents, at different rates and in different ways or not at all”*, thereby resulting in a continuation of the issues mentioned in the Problem Definition section. While the qualitative reasoning appears is sound, no source of information is cited to underpin these conclusions.

The preferred option is also analysed in light of the principle of subsidiarity, using the analysis and data established during the comparison of the policy options. With this in mind, it can be

concluded that the issue of subsidiarity has been adequately considered and addressed in the Impact Assessment, although not been substantiated with concrete data and references.

## 2.4 Proportionality

The Impact Assessment does not include a separate section on proportionality, it is instead mentioned on page 58 as an outcome of the comparison of the Policy Options, stating that, *“the preferred option complies with the principle of subsidiarity, as the EU digital single market in this field cannot be accomplished by Member States acting nationally”* and *“the preferred option does not go beyond what is necessary to solve the identified problems and is proportionate to achieve its objectives.”* The Impact Assessment clearly explains how the preferred option would fit into existing legislation and why the details of the option are appropriate within the context of the four intervention areas.

Additionally, there is a section on proportionality in the legislative proposal (Section 2.3), which establishes how different aspects of the proposal are linked to proportionality. This reflects the analysis conducted in the Impact Assessment. It is also stated that *“the proposal will rely to a high degree on existing EU instruments and frameworks”* and that *“it is only in the absence of other cooperation mechanisms, and when other means of access have been exhausted, that the cooperation mechanism of the proposal will be used...”*. The legislative proposal thus outlines a sufficiently detailed description of how the proposal takes proportionality into account. This is based on the analysis and conclusions of the Impact Assessment and shows that the Commission has correctly considered proportionality, after the analysis of the options.

## 2.5 Choice of legal instrument

The choice of legal instrument is established by the basis of the policy options presented. It is stated in the Impact Assessment that *“Options 2, 2a and 3 could take the form of either a Directive or a Regulation.”*

The choice is also informed by the public consultation, which highlighted that a *“majority of participating stakeholders (55.3% of respondents) believe that legislative action is the most appropriate instrument to tackle unjustified localisation restrictions, with a number of them calling explicitly for a Regulation.”* This result may be taken as a supporting point, but an opinion expressed by a small majority of the consultation respondents does not carry enough legitimacy to provide additional justification for the proposed way forward. In addition, the accuracy of the quoted percentage figure can be questioned (see Section 3.1.4 below).

In the proposal itself, the justification for a Regulation is to *“ensure that uniform rules for the free flow of non-personal data are applicable throughout the Union at the same time. This is particularly important to remove existing restrictions and prevent new ones being enacted by Member States, to guarantee legal certainty to the concerned service providers and users and thereby increase trust in cross-border data flows as well as data storage and other processing services.”* This is in line with the evidence and analysis presented in the Impact Assessment.

The text adequately presents the reasoning for proceeding with a regulation as the legal instrument.

## 3 Input data

The availability and quality of data is a key element in determining the reliability of the findings presented in an Impact Assessment. According to the Better Regulation Toolbox, *“data sources*

*should be provided and underlying assumptions illustrated in relation to any quantification*"<sup>4</sup>. Furthermore, a potential lack of quantitative data should be acknowledged in the Impact Assessment and compensated by further qualitative assessment<sup>5</sup>.

In this case, the lack of available quantitative data was acknowledged at many points in the Impact Assessment. Where it was appropriate, the study uses examples and proxies to illustrate arguments and generate estimates. The Institute has scrutinised the main sources of data that were used for this Impact Assessment and drawn the conclusions that the data sources used in most cases are transparent and maintain an appropriate level of analysis, but in some cases lack robustness.

### 3.1 The public consultation

The public consultation used to inform the Free Flow of Data Regulation is part of the wider 'Building the European Data Economy' package, which also concerns issues on data ownership, access, reuse, portability and liability. While the consultation is a significant input for the problem definition and is often used to support conclusions made through the Impact Assessment, the consultation's wider scope is not explicitly mentioned, providing an inaccurate impression to the reader of the relevance of the results.

The 'Public consultation on Building the European Data Economy', which targeted businesses of all sizes across all sectors, received 380 responses, 332 responses from businesses / organisations, 6 responses from self-employed individuals, and 42 responses from citizens. In addition, there were a number (between 15 and 18) of standalone contributions (the sending of a position paper or opinion) from the likes of "*national authorities, companies, national or European business associations, insurance associations, and lawyer representatives in EU and the US.*"

Additionally, the European Political Strategy Centre (the EPSC) held a public hearing, the transcript of which serves as a contribution to the public consultation.

While the Impact Assessment presents general figures on the number of overall respondents to the consultation, it does not clarify which segments of these respondents responded specifically to the Free Flow of data part, since some respondents answered to the other policy issues. The information about which of the respondents are relevant is only clarified in the annexes to the Public Consultation document, leading to an inaccurate depiction in the Impact Assessment itself of how the consultation input was used in relation to the Free Flow of Data. According to the annexes of the consultation, 318 of the 380 replies answered in the Free Flow of Data section.

In addition to the multiple choice questions, the consultation allowed some text input as well as the upload of position papers and other data from stakeholders. The additional input provided some valuable information, for example regarding the existence of data localisation restrictions and uncertainty about the legal position.

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<sup>4</sup> Better Regulation Guidelines SWD(2015)111, p.28, European Commission, May 19<sup>th</sup> 2015.

<sup>5</sup> Ibid

### 3.1.1 Line of questioning

The way in which the public consultation is designed seems to have led to issues relating to segmenting and analysing data.

For instance, the consultation asked participants the following questions:

1. *'In your opinion, should data localisation restrictions be removed within the EU?'* with 59 respondents answering "I don't know", 55 "No", and 185 "Yes".

This question appears prior to asking or defining the type of data localisation restrictions to which the question refers. It is also not clear whether this question is restricted to non-personal data. Within the context of the consultation, one would assume non-personal data, but given the wider scope of the consultation including questions outside the free-flow of data, it is unclear whether participants would have understood the distinction.

A follow-up question asks:

2. *"what type of restriction(s) this concerns"* – 196 respondents highlighted a number of restrictions, with "legislative requirements" being mentioned 174 times, "administrative rules" 91 times, and "guidelines" with 88 mentions.

This question is also located prior to defining the type of data in question, which becomes problematic when a follow-up question asks which type of data is subject to localisation restrictions.

Here, 195 out of the 380 respondents chose the following answers:

- 142 mentions of *"Personal data for reasons other than the protection of natural persons with regard to the processing of personal data"*
- 133 mentions of *"Business privately-held data"*
- 87 mentions of *"Non-personal publicly-held data"*

The public consultation as well as the consultation synopsis are unclear as to what constitutes *"non-personal data"* relating to these choices. A representative from DG Connect stated during a panel discussion<sup>6</sup> that non-personal data is defined as everything that does not fall under the Commission's definition of personal data. This is not fully explicit in the consultation nor in the Impact Assessment. This leads to a confusion regarding how the consultation data has been used in the Impact Assessment and whether the intention of the respondents has been correctly evaluated.

### 3.1.2 Questions on impacts

With regard to the questions on impact in the public consultation, there appears to be a conflation of the impacts cited for personal and non-personal data restrictions, as previous questions make it difficult to differentiate the two effectively, taking into account both the line of questioning and the order in which they are given. The data is unclear on what impacts are related to which particular restrictions. The options for the assessment of impacts on respondents are 'high', 'medium', and 'small'. These levels are not specifically defined and it is

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<sup>6</sup> "A Digital Presidency. Takeaways from Estonia's programme for a Digital Europe, 14<sup>th</sup> December 2017, Brussels

left to the respondent to assume their meaning. With this in mind, they are highly contextual and difficult to use to establish a comparative.

### 3.1.3 The balance of the consultation

The synopsis report of the public consultation states ***“the consultation in combination with the structured dialogue sessions with the Member States allow for a balanced view”***<sup>7</sup>. The accuracy of this assertion largely depends on how representative the public consultation was.

According to the synopsis report and the annex to the public consultation, the online survey *“received a total of 380 responses, including 332 responses from businesses/organisations, 6 responses from self-employed individuals, and 42 responses from citizens”*. Out of these *“28 % of the businesses/organisations that responded operate in Belgium (including many Brussels-based organisations such as European associations). The following 6 countries were Germany, France, the UK, Spain, the Netherlands and Italy.”* Further information of the breakdown was not provided. From this information it cannot be concluded that consulted stakeholders represent a balanced sample, when considering the number of Member States and stakeholders with a potential interest in the topic.

Additionally, the evaluation of the results of the public consultation can be questioned on its balance. Examples given in the Impact Assessment show a majority of stakeholders wanting to see solutions for data localisation restrictions but it also gives a brief mention to public administrations who would want to keep such restrictions. However, the latter opposing view does not come across in the public consultation, calling into question the range and variety of its input.

Furthermore, only 318 responses out of overall 380 replied to the free flow of data section of the consultation. For this specific section of the data, a detailed breakdown of nationality, stakeholder type, or industry was not provided.

### 3.1.4 Preferred course of action.

The public consultation also asked participants to state the most appropriate action via a multiple-choice question. 289 respondents participated.

Based on the findings from the public consultation the Impact Assessment states:

*“The outcome was that ‘a legislative instrument’ seems the most appropriate action (151 times), followed by ‘guidance on data storage/processing within the EU’ (137 times) and ‘increasing the transparency of restrictions’ (128 times). ‘Other’ options received a significantly lower amount of selections (55 times).”*

While a legislative instrument received the largest number of respondents, the choice received 151 out of 471 total options selected (around 32%). The analysis does not provide any indication of the overlap between choices and how respondents selected multiple preferred actions.

Even if taken at face value, and assuming that a legislative instrument received the largest support from the 289 respondents who participated (it would have received around 52% and

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<sup>7</sup> Synopsis Report: Consultation on the ‘Building A European Data Economy’ Initiative, Page 3, European Commission, 7<sup>th</sup> September 2017.

14 more ‘votes’ than the second most popular option), this alone does not provide sufficient justification as to the most appropriate option. The mere number of respondents is not an indication of overall representation. Different respondents represent varying sizes of organisations, associations, or even individuals, the weighting of which is not specified. The lack of confirmation of adequate geographical diversity also puts into question whether the answers are representative of the preferred option from stakeholders EU-wide.

The annex to the public consultation also makes mention of respondents who gave ‘other’ answers. Significantly it mentions:

*“However, not all respondents favour a regulation. A second category asked for an approach using the already existing regulatory framework. In particular, they favour the removal of unjustified data localisation restrictions by extending the notification procedures already established by EU law under the E-Commerce Directive, the Services Directive or the Transparency Directive. **A sectoral analysis shows that participants who answered along these lines (5 responses) are all from the telecom sector, except for a contribution by an association for businesses involved in intellectual property and patents.**”*

And

*“**A third category of respondents (5 responses) called for further analysis and assessment to be conducted by the Commission before making a choice about the most appropriate instrument.**”*

This input was not mentioned in the Impact Assessment, nor is there any evidence whether there was an assessment of the validity of the requests made about further analysis.

Overall, the use of the results in determining the most appropriate course of action is problematic, especially as stakeholders’ views are considered by the Impact Assessment as a criterion in evaluating and selecting the chosen policy course. Due to the lack of experimental controls, consultations cannot be deemed to be a robust source of evidence for an Impact Assessment. They provide valuable information on opinions, which require further evidence to be corroborated.

### 3.2 Member States’ input

In preparation of the Impact Assessment, the Commission held three structured dialogues, as well as bilateral meetings with 16 Member States.

While there are references of support to an EU initiative on the Free Flow of Data, there are no accounts of opposition to or concerns about an initiative. This is in spite of some brief references to unspecified public administrations having interest in keeping data localisation restrictions. The reasoning for not including such dissenting views is not clarified and the countries to which this refers are not specified.

A broad and balanced overview of both proponents and opponents to an initiative should be part of any fact-finding mission in order to have a comprehensive representation of views on that initiative. Without this understanding, the reader is left with the impression that the initiative has broad support from all parties including Member States, with little or no opposition.

## 4 Analytical methodology

In evaluating policy impacts and creating an understanding of the issues at play, the Impact Assessment uses various analytical models when appropriate and possible (as outlined in Annex 4). Overall, the analytical methodology of the Impact Assessment sets out to accomplish two things: 1) establish a clear set of policy objectives which can be used to compare the effectiveness of policy options and 2) evaluate the policy options with regard to different impact areas.

The specific objectives, which are derived from the Impact Assessment's problem definition, are coherent with the analysis provided. They are shown on page 18 and are as follows:

- 1) Reduce the number and range of data localisation restrictions, enhance legal certainty and transparency of remaining (justified and proportionate) requirements;
- 2) Facilitate cross-border availability of data for regulatory control purposes, specifically when that data is stored / processed in another Member State, reducing the propensity of Member States to impose data localisation restrictions for that purpose;
- 3) Improve the conditions under which users can switch data storage and processing (cloud) service providers and port their data to a new provider or back to their own IT systems;
- 4) Enhance trust in and the security of (cross-border) data storage and processing, reducing the propensity of market players and the public sector to use localisation as a default safe option.

With these specific objectives the Impact Assessment establishes four areas of intervention having taken into account the public consultation and the structured dialogue with the Member States. The four areas are:

- 1) Free flow of data across borders;
- 2) Data availability for regulatory control by Member State authorities;
- 3) Switching and porting data between providers and IT systems;
- 4) Security of data storage and processing.

Within the evaluation of the policy options, these four areas of intervention relate to the **effectiveness** of policy options, later used as impact areas when comparing the different policy options. Each area is evaluated according to the following impact criteria: **economic, environmental & social, coherence with existing legislation, burden on Member State authorities, and stakeholder's support**.

### 4.1 Presentation of Policy Options

The Impact Assessment provides plausible explanations for the alternative options for achieving the policy objectives and why some others were discarded. The four assessed policy options are:

- **Option 0: Baseline / No change in EU policy**
- **Option 1: Non-legislative initiative**
- **Option 2: Principles-based legislative initiative and cooperation framework (includes sub-option 2a which includes aspects of self-regulation)**
- **Option 3: Detailed legislative initiative**

The presentation of the policy options is mostly clear in that it largely describes what each option would entail, reflects the potential effects, and has ties to the problem definition and

the specific objectives. The few shortcomings are seen with occasional cases of skewed language, inconsistent reasoning, and lack of explanation as to how certain aspects of the policies would function – as illustrated below.

The way the descriptions of the policy options are worded indicates a certain amount of pre-judgement of the preferred option, whereas at this stage the options should be set out in a balanced and factual manner without any apparent conclusion on their merits. Specifically, for Option 0 it is stated that it “...*would imply: ... - Relying on...*” a number of other actors to take steps, implying a negative judgement about the likelihood or desirability of this status. By contrast Options 1 to 3 are each presented in a positive manner, with “...*This option would:...*” achieve certain objectives.

Whilst this is a subtle nuance of the language, it is immediately apparent to the reader and indicates some pre-judgement of the impact and the overall evaluation.

There is also a lack of clarity as to the full extent of Option 0. This confusion stems from Option 0 representing the status quo and no change in EU policy, whilst Option 1 mentions “using existing sectoral guidelines” and “[encouraging] MS by means of existing transparency mechanisms”. It is unclear whether the same existing provisions would apply under Option 0 and if not, why this is the case.

While Option 0 does make a short mention of some existing mechanisms, it is both left vague and is not expressed in the same proactive tone as in Option 1, potentially leading the reader to assume that existing mechanisms would not be used in the same manner under Option 0. This leaves questions of how accurately Option 0 is represented.

While most options list a number of measures aimed at achieving the overarching policy option, there is little explanation or justification for including those specific measures.

Towards the end of the presentation of policy options, the Impact Assessment provides a figure (page 22) summarising the measures by the four intervention areas that each policy option would entail. Relating to the issue raised above, Option 0 is not apportioned any measures, despite the mention of the existing mechanism of “*transparency*” under Option 1. If these measures exist under both Option 0 and Option 1, they should be listed as such in the figure to provide a balanced representation.

## 5 Impacts

The Impact Assessment clearly states that most of the sources used to conduct the impact analysis “*provide qualitative rather than quantitative insights*” (page 24). Section 6 of the Impact Assessment is divided per the policy options and then goes through the impacts for each one. The following analysis follows the same structure.

### 5.1 Option 0: Baseline

#### 5.1.1 Economic impacts

The section on the Free Flow of Data across borders mentions that under Option 0, “Member States would have **wide discretion to put in place new data localisation restrictions and maintain the existing ones.**” However, the Impact Assessment is also explicit that some Member States consider taking actions unilaterally to ease restrictions. Withholding that information in the economic impact section and presenting a limited set of scenarios gives an incomplete picture.

Within the context of costs of setting up a new business (page 26), a study<sup>8</sup> is cited, stating *“that 1 out of 7 European scale-ups move their headquarters abroad. 83% of them choose the United States, of which a majority ends up in Silicon Valley.”* Option 0 is presented as not being able to *“counter this trend and would therefore lead to a loss of growth and innovation potential for the European economy.”* There are two shortcomings with this reasoning. Firstly, the data storage and processing costs can only be one of many factors contributing to company decisions to move their headquarters. The Impact Assessment does not provide analysis on its relative importance compared to other factors. Secondly, upon further inspection of the study cited by the Impact Assessment, it becomes clear that the scale of the purported negative impacts can be questioned. The study focuses on *“dual companies”* which it defines as *“scaleups initially founded in a European country that subsequently moved their headquarters abroad, while maintaining a strong operational presence (such as R&D activities) in their country of origin”*. By this definition, the companies to which the Impact Assessment refers would still have substantial operations in Europe.

### 5.1.2 Environmental and social impacts

Under environmental impacts for Option 0, the Impact Assessment states that *“No positive environmental impacts are to be expected under Option 0”*. It subsequently proceeds in the same section to explain the positive environmental impacts of taking action within the free flow of data. The placement of such an explanation would have been more valid if it had been placed under the options that do in fact take action. The analysis made under Option 0 is later used to validate conclusions made under the subsequent options. The Impact Assessment could have instead been better served by including analysis relevant to the impacts of each of the policy options.

The text states *“...it will allow cloud service providers to locate their data centres in locations where there are substantive energy efficiency gains to operate such infrastructures.”* However, the more likely driver is cost, of which energy efficiency is one element. If data centres are relocated to areas with low cost but high carbon and high emission electricity, the environmental impact would be negative. An assessment of this potential effect would have been necessary in order to have a robust indication of the impact.

The section also states that *“the baseline option would allow for the persistence of data localisation restrictions by Member States and through market dynamics, it would therefore have a negative impact on the environment.”* This negative impact is not reflected in the comparison of the policy options, in which the baseline is seen as having a neutral impact.

Under social impacts, the Impact Assessment elaborates on a growing data skills gap. However, when citing the information, it only states *“Idem, p.198”* in a footnote. However, this reference cannot be found. The absence of a valid reference undermines the value of the analysis.

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<sup>8</sup> Study on Transatlantic Dynamics of New High Growth Innovative Firms, European Commission, March 2017, [http://ec.europa.eu/research/innovation-union/pdf/expert-groups/rise/transatlantic-dynamics\\_final-report.pdf](http://ec.europa.eu/research/innovation-union/pdf/expert-groups/rise/transatlantic-dynamics_final-report.pdf)

### 5.1.3 Impacts on Member States' public authorities

The Impact Assessment clearly explains expected qualitative impacts on public authorities for each of the Policy Options and presents rational reasoning behind it. The burdens are projected to be modest.

### 5.1.4 Stakeholder views

The supporting analysis from the public consultation appears to be a reasonable representation of the stakeholder views. However, the very precise percentages (“77.4% of respondents indicated that localisation demands were rooted in compliance concerns” and “56.8% of SME respondents ... indicated ... that there are important barriers to data portability”) cannot accurately reflect the weight of opinion. It has not been demonstrated that the respondents are fully representative of stakeholders and the formulation of the multiple-choice questions also has a bearing on the answers given (see Section 3.1 above). The precise numbers imply accurate analysis but are not robust enough to be used to evaluate impact.

## 5.2 Option 1: Non-legislative initiative

### 5.2.1 Economic impacts

Modest impacts are projected in comparison to the baseline and this is qualitatively well argued in the text, without any quantitative evidence. It also makes a coherent analysis of the difficulty of infringement proceedings against localisation restrictions.

### 5.2.2 Environmental and social impacts

There were no substantial concerns with the new analysis presented in this section, in particular to the social impacts. However, as mentioned, the concentration of analysis for environmental impacts appearing under Option 0 (Section 5.1.2 above) weakens the robustness of the analysis for the proceeding options. It would have been preferable for the Impact Assessment to analyse each option individually for this criterion.

### 5.2.3 Impacts on Member States' public authorities

The Impact Assessment clearly explains expected qualitative impacts on public authorities for each of the Policy Options and presents rational reasoning behind it. It states that these are mostly expected to be similar to Option 0. Regarding strengthened enforcement it states that this could lead to additional administrative burdens, correctly asserting that the magnitude would depend on the implementation by Member States.

### 5.2.4 Stakeholder views

In the impact section for Option 1 it is stated that “stakeholders have indicated not to support Option 1”. However, as previously mentioned, out of 289 respondents, 151 choose a legislative instrument as the most appropriate action, 137 choose guidance on data storage/processing,

128 wanted increased transparency of restrictions, and 55 selected 'other' options. The statement is therefore not substantiated.

The same section also states that *"The same message appears from the public online consultation, in which 55.3% of respondents argue for a legislative approach. The majority of stakeholders, therefore, would be disappointed with an approach as under Option 1."*

However, as stakeholders had the option of selecting multiple appropriate actions and the Impact Assessment does not provide a clear depiction of choice overlaps, it is not demonstrated that the statement is representative.

The section also cites pressure from the press (page 37) to uphold the Commission's promised actions under the Digital Single Market strategy. The press is not a good reflection of stakeholder sentiment and its citation as support for one option over another does not constitute appropriate evidence.

Under the section on 'Data availability for regulatory control by Member State authorities' the Impact Assessment states that *"it is unlikely that Member State discussions / exchanges of best practices would lead to tangible results in terms of trust either on the part of public authorities or the part of market players. Therefore, Option 1 would not enhance the data availability concerns"*. However, the Impact Assessment does not explain how it reached this conclusion.

## 5.3 Option 2: Principles-based legislative initiative and cooperation framework

### 5.3.1 Economic impacts

#### Free flow across borders

The macro-economic impacts of Option 2 are presented as being supported by a Commission procured study<sup>9</sup>. However, a closer look at the study shows that a number of the claims in the Impact Assessment are not substantiated.

It states that *"this study concludes that a free flow of data legislative proposal taking away data localisation would be the most important factor in driving the European data economy towards the high growth scenario of 4% GDP by 2020."*

Yet the study does not conclude this, instead it suggests that localisation *"may hinder"* data-driven innovation and related developments. Secondly, it refers to the need for free-flow of data as *"an important requirement"*, not as the most important factor. Lastly, the study makes no mention of growth scenarios relating to 2020. This is problematic as the claims made represent the bulk of the support for macro-economic impacts. This evidence therefore provides support for the claims made for Option 2 but is not sufficient to prove the extent indicated.

In a section for 'impacts on businesses', evidence is provided via a Deloitte study<sup>10</sup>. It projects an increase in value added (NPV) for cloud users of €7bn, cloud providers of €4bn and society

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<sup>9</sup> "European Data Market. Data ownership and Access to Data - Key Emerging Issues", SMART 2013/0063, IDC, 29<sup>th</sup> January 2016.

<sup>10</sup> "Measuring the economic impact of cloud computing in Europe", (SMART 2014/0031), Deloitte, 2016.

of €0.85bn from 2015 to 2020. It characterises the benefit for users as “modest in relative terms” (1.36%). The study appears to be thorough and consistent in its data and analysis, with the results being materially relevant.

The Impact Assessment states then towards the end of the section, that the “*results are corroborated by the results of the public consultation*”. It would be more correct to say that they are supported by the responses to the public consultation, since the Public Consultation itself does not have quantitative figures on costs for businesses, and is therefore not a position to corroborate such conclusions.

In a section on ‘quantitative impacts’, the Impact Assessment addresses cost differentials for data storage between certain Member States. In trying to establish the effects on the competitiveness of European SMEs, it estimates the following:

- storage requirements of SMEs (50 TB per month),
- the proportion that use cloud services (8%)
- the proportions using “cheap” and “expensive providers” (50% each)
- the cost differential using one data point (Hungary vs. Germany: 51.69€/GB)

The figures for storage requirements and the proportions using cheap and expensive providers are not referenced. The text itself admits that the estimate (€26,000 savings per SME per year) “has little scientific value”. Directionally the estimate makes sense, in that savings for SMEs and other companies would be the expected results of this option. However, to add value to the evidence such estimates should be substantiated with valid data and projections.

Overall, while the Impact Assessment demonstrates that a material economic benefit can be expected, some of the evidence lacks concreteness.

#### Data availability for regulatory control by Member State authorities

The qualitative explanations of the expected positive impacts on efficiency and reduced uncertainty and the limited burden of contractual costs are coherently presented.

#### Switching and porting data between providers and IT systems

The text again makes coherent qualitative arguments for the proposed provisions, in particular associating the expected economic impacts with the forecast growth in cloud services to 2025. Some quantitative analysis would have been useful in order to substantiate the impacts. It also refers to evidence that suggests that legislative action should not be too detailed. The only specific given is from concerns expressed by some stakeholders in the public consultation, without explaining the concerns.

Likely additional regulatory burden and compliance costs are asserted, without quantification. The text argues that this burden will anyway be borne due to the portability right under the GDPR, but if this argument were valid, it could be argued that there is little additional benefit from the proposed regulation, contradicting the previous evidence. This section adds no value to the assessment.

Regarding Sub-Option 2a (self-regulation), the assertion that it “...would still induce the largest amount of the positive economic effects assessed for Option 2 above...” is not fully substantiated, although directionally it is reasonable.

#### Security of data processing

The qualitative part of the assessment of economic impacts of Option 2 is presented coherently, whereby the projected additional NPV of 3.5bn over five years from uptake of certification and standards appears to be based on sound analysis.

Regarding Option 2a, the added legal certainty is properly argued, although this does not lead to an explicit conclusions regarding economic impact.

### 5.3.2 Environmental and social impacts

Reference is made here to Section 5.2.2.

### 5.3.3 Impacts on Member States' public authorities

The Impact Assessment estimates that 0.5 full time equivalent (FTE) costing around €33,000 per year would be sufficient to cover the need for a 'single point of contact expert group' on free flow of data. No derivation of the FTE estimate is presented. In terms of the working time required, this may be a reasonable estimate. However, setting up and running a committee requires preparation, coordination, travel, attendance and follow up, burdens whose nature may not be fully captured by a simple time and cost figure, and will likely present different challenges in different Member States.

Whilst the assertion that "*Option 2 would lead to moderate administrative burden for Member States...*" may be qualitatively consistent, especially when comparing to the projected economic benefits, a simple absorption of this work into an additional 0.5 FTE may not fully represent the administrative burden.

The text further states that Option 2 would put in place notification/review procedures to verify compatibility, but that all options would include notification and review. It is therefore inconsistent that this section includes an estimate of the costs of this notification/review for option 2, but is not included in the assessment of the other options. This would be necessary for a robust comparison. The cost estimates themselves appear to be well referenced.

### 5.3.4 Stakeholder views

The Impact Assessment makes appropriate use of the some of the consultation's findings in this section. A shortcoming however is that the stakeholder's views section for Option 2 infers that the majority would support it as an option. Given the issues identified in the consultation and evaluation of its results (Section 3.1 of this study), such claims are not robust.

The stakeholder section also includes several comments from the Public Consultation to support Option 2. This practice of exemplifying arguments via stakeholder comments from the Public Consultation is not done for Option 0 and is limited in Option 1 and 3 despite there being stakeholders who have shown of support for those options.

## 5.4 Option 3: Detailed legislative initiative

### 5.4.1 Economic impacts

The macro-economic and business impacts of Option 3 are not explicitly evaluated, as no specific analysis is presented. The text states that "*...this option would only moderately reduce*

*the number and range of data localisation restrictions and prevent the emergence of new restrictions". It gives the reasoning that "...the pre-defined assessments approach would incite Member States to seek listing entire sectors or types of data as areas of justified restrictions". Whilst there is logic to this assertion, no evidence or supporting opinions are presented to substantiate it.*

The Impact Assessment makes the claim that *"The impacts on the business sector under this option are going to be equally sizeable as under Option 2 and of the same indirect nature". It does not provide evidence or reasoning for this claim. Further, the above-cited consequence of restrictions only being moderately reduced indicates a significantly lower impact for all parties, including business.*

#### 5.4.2 Environmental and social impacts

Again, reference is made here to Section 5.2.2.

#### 5.4.3 Impacts on Member States' public authorities

The Impact Assessment clearly explains expected qualitative impacts on public authorities for each of the Policy Options and presents rational reasoning behind them. In particular the greater burden of Option 3 compared to Option 2 is expressed, although the derivation of the figure for additional FTEs is not shown. The quantitative result is modest (€83460 per Member State) in comparison to the projected economic benefits. As in Section **Error! Reference source not found.** above, how this affects Member States' administrations in practice and how it differs between Member States is more complex and would have to be determined case-by-case for a full assessment.

#### 5.4.4 Stakeholder views

With regard to Option 3's potential on raising awareness around the principle of the free flow of data, the Impact Assessment mentions several stakeholders expressing that *"Option 3 would be probably less convincing than Option 2 because Option 3 is a purely legislative option and makes no reference to awareness raising activities. The reason is that Option 3 foresees comitology as execution mechanism, instead of a cooperation group made up of representatives of Member States' civil services. Without awareness raising, these stakeholders could argue, it is not efficient to adopt legal principles on the free flow of data as this would insufficiently address the legal uncertainty and lack of trust problems that were identified by nearly all stakeholders."*

It is not explained why awareness raising actions cannot be taken under Option 3. Option 2 was given a sub-option (2a), it is not clear why Option 3 could not be modified to address this concern of the stakeholders.

## 6 Evaluation methodology & results

In section 7 of the Impact Assessment, the previously mentioned impact areas are compared with each of the policy options being assigned a score. This scoring system is a scale from -2 to

+2 with scores being assigned based on how well policy options perform compared to the impact areas. Score are defined as:

- 2: directly negative impacts
- 1: indirect negative impacts
- 0: neutral
- +1: indirect positive impacts
- +2: direct positive impacts

The terms “directly negative” and “indirect negative” are not defined, although some explanation can be inferred from the scoring explanations for each option. This system implies that the degree of directness of the impact correlates to the numerical score. However, it is conversely possible that an indirect impact could be greater than a direct one, depending on the impacts’ precise nature. The scoring system itself is therefore not coherent. With only five discreet scores, it also allows insufficient differentiation between individual evaluations.

Further, the definition of “neutral” is not clear. In the evaluation it is clear that Option 0 has been assigned a neutral assessment for all elements. However, in the case of no EU policy change, some type of impact would still be expected.

More specifically, there is a lack of clarity over whether some of the impacts stated for other options potentially hold true under the baseline. It also highlights the question why Option 0 was not analysed accordingly in each of the impact areas.

Reviewing the evaluation of all the options, the comparison shown in the table exhibits clear analytical flaws and inconsistencies.

- In terms of effectiveness, Option 1 is given a score of -1 despite it being stated that it “*could be an improvement on the baseline scenario*”. If this is the case, that would constitute a positive impact (i.e. a positive score). As effectiveness is measured as the reaching of the policy objectives, Option 0 should have a negative impact instead of being scored 0 as seen in the score table. As it stands, the analysis seems to indicate that doing nothing is better than both option 1 and 3 in terms of reaching the policy objectives, in contradiction to the explanations of the options.
- In assessing the environmental and social impacts, Option 1 is given a score of +1 due to the use of existing legislation to combat data localisation. If the legislation exists, then the same impact ought to occur under Option 0. If this is not the case, the Impact Assessment has not provided an explanation as to why the positive impacts of existing legislation would not also occur under the baseline or no change in EU policy.
- Additionally, as the results of the public consultation indicate low support for the status quo, Option 0 can be seen as not being supported by stakeholders. With this in mind, Option 0 should have a negative score instead of 0. As it stands, the evaluation table seems to indicate that Option 0 is more popular with stakeholders than both Option 1 and 3 despite the public consultation results showing the opposite.
- Furthermore, Option 3 is first given a lower positive impact due to the claim that stakeholders “have not advocated a detailed legislative initiative”. However, whether stakeholders would support a detailed legislation is not demonstrated by the results of the consultation. Lack of advocacy for one option out of several is not necessarily a signal of lack of support. Option 3 is also downgraded 2 points due to the majority expressing concern that the Commission could be “too prescriptive in terms of prescribing technological standards”. It is unclear why this downgrade constitutes -2 instead of -1.

- Additionally, the method of explanation of the scoring is inconsistent. In particular, Option 3's written analysis discussed this arithmetic whereby for the other options only the final figure was quoted.

There is also a question of whether stakeholder support should be used an evaluation parameter for the policy outcome. It is not explained why this is a valid evidence parameter, nor are the aforementioned issues with representativeness resolved. Given the issues of the public consultation previously mentioned in this study, assigning a concrete score to each option is problematic.

Regarding the balance of assessment between policy options, there are issues in both the Effectiveness and Economic Impact sections. For example, Option 3 is not given the same amount of analysis as Option 2 and 2a, despite representing a potentially more substantial piece of legislation. In the Effectiveness section, Option 3 is also directly compared with Option 2 instead of being assessed based on its own merits. It is therefore not balanced in terms of the assessment of these options, and indicates a lower priority given to Option 3 in the assessment.

Lastly, there is a fundamental question of how different impact parameters compare with each other. The Impact Assessment grants a score across these parameters and tallies them up for a total. Effectively, a negative score in one impact area can negate a positive score in another area. However, within the context of the proposal and policy challenge, it cannot be assumed that all of the evaluated impact areas have equal importance, nor that aggregating scores in this manner is effective in finding the option that solves the challenges as outlined in the problem definition.

In particular, economic impacts are assigned the same weight as all the others, whereby the projected economic benefits represent a primary rationale for the selected policy. For policy option 2, this enables a +2 evaluation for economic impact to be fully counterbalanced by a -2 for burden on MS authorities (or for coherence). A coherent weighting scheme would emphasise the economic benefits to a greater extent. This would still result in option 2 being preferred, but it would be supported by a much more coherent rationale.

Further, the final comparison is highly dependent on the evaluations given for stakeholder support, again leading to the question whether policy should be guided by opinions provided through consultation with no guarantee of representativeness of affected parties.

Impacts	Option 0: Baseline Option – no EU policy change	Option 1: Non-legislative initiatives to promote free flow of data	Option 2: Principles-based legislative initiative  and Sub-option 2a: Combination of principles- based legislation and self- regulation	Option 3: Detailed legislative initiative
Effectiveness	0	-1	Option 2: +2 Sub-option 2a: +2	+1
Economic	0	0	Option 2: +2 Sub-option 2a: +2	+1
Environmental & Social	0	+1	Option 2: +1 Sub-option 2a: +1	+1
Coherence with existing legislation	0	0	Option 2: -2 Sub-option 2a: 0	-2
Burden on MS authorities	0	-1	Option 2: -2 Sub-option 2a: -2	-2
Stakeholders' support	0	-2 (free flow of data) 0 (switching & porting data)	Option 2: +2 Sub-option 2a: +2	+1 (free flow of data) -2 (switching & porting data)
<b>Total</b>	0	<b>-2</b>	<b>Option 2: 3</b> <b>Sub-option 2a: 5</b>	<b>-2</b>

*For each of the different categories of consideration, the options received scores on a scale from -2 (direct negative impacts) to +2 (direct positive impacts). The calculated total scores are displayed in the last row.*

Table 1: Summary of the Impacts across the policy options as presented in the Impact Assessment

Given the comments above, the scores found within this table are not properly justified, nor can the exercise in general be considered a robust method for comparing policy options.

However, even taking these shortcomings into account, a reasonable revision of the results of the evaluation would reach the conclusion that Option 2, and specifically 2a, is the most beneficial, according to the available evidence.

## 7 Coherence with the legislative proposal

### 7.1 Feasibility of the comparison

Despite the issues mentioned previously in Input Data and Analytical Methodology sections of this study, the Impact Assessment does manage broadly to compare the different impact areas across the presented Policy Options. While some impact areas for some options are given more prominence than others, there is enough analysis to make a comparison.

### 7.2 Outcome of the comparison

While the Impact Assessment has some shortcomings in terms of the analysis of impacts across the policy options and with its methodology for selecting the most appropriate course of action, the selection of Option 2a does appear to reflect the available evidence and analysis.

The Commission’s Legislative Proposal follows the conclusions found within the Impact Assessment and reflects its evidence base and analysis. However, some of the shortcomings related to the use of the results of the Public Consultation (as previously discussed in section 3 of this study) are repeated in the Legislative Proposal.

Whilst the presence of the identified shortcomings does not invalidate the choice of policy option within the context and the logic described in the Impact Assessment, it does undermine the robustness of the evidence according to the standards prescribed under Better Regulation. It does not establish a fully evidence-based comparison of viable options.

## 8 Compatibility with other EU policies

The Impact Assessment clearly illustrates the diverse range of existing mechanisms and legislations that relate to the Digital Single Market and how a proposed legislation would build upon previously implemented policies. Over the course of the Impact Assessment's analysis, there are clear explanations on how and why different policy options could overlap with existing mechanisms and legislation. This is taken into account during the selection of the most appropriate policy option.

Based on the evidence provided via the Impact Assessment and subsequent legislative proposal, compatibility with other EU policies appears to have been taken into account. The legislative proposal for instance, explains conclusions derived from the analysis in the Impact Assessment in justifying its compatibility with other EU policies and existing measures. Based on the findings of this study, the European Commission has demonstrated compatibility.

## Annex I: Accompanying statement

This report has been written according to the guiding principles of the Impact Assessment Institute: transparency, objectivity, legitimacy and credibility. It analyses the subject matter from a purely factual and scientific point of view, without any policy orientation. In respecting these principles it has been compiled following its written Study Procedures.<sup>11</sup>

The analysis is open to review and criticism from all parties, including those whose work is scrutinised. Contacts with all relevant parties are recorded to ensure transparency and to guard against “lobbying” of the results.

By its nature the report has a critical characteristic, since it scrutinises the subject document with its main findings entailing the identification of errors, discrepancies and inconsistencies. In performing this work, the intention of the report is to be constructive in assisting the authors of the subject document and its background information as well as all relevant stakeholders in identifying the most robust evidence base for the policy objective in question. It should therefore be seen as a cooperative contribution to the policy making process.

This report is also to be considered as a call for additional data. Peer review is an essential step laid down in the procedures of the Impact Assessment Institute and this is manifested in the openness to further review and to identify new data. Even at publication of the final version, the report explicitly requests additional data where the readily available data was not sufficient to complete the analysis, and is open to newly arising data, information and analysis.

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<sup>11</sup> “Procedures for Conduct of Studies”, Impact Assessment Institute, December 2015 (<http://www.impactassessmentinstitute.org/#!/procedures/c1q8c>)

## Annex II: Input received from stakeholders

Outreach to industry, Member State governments and civil society was undertaken in the course of writing the draft study.

This activity resulted in only one direct meeting, with a company active in the digital economy domain.

The draft was sent out to the European Commission and interested stakeholders (industry, NGOs, Member States, think tanks) on 12<sup>th</sup> February for a three-week review. A number of responses were received that informed the final version.

<b>Organisation responding</b>	<b>Content of response</b>	<b>IAI reply and action</b>
European Commission	The Commission services will not be commenting on the draft study as the Commission has its own internal review mechanism through the Regulatory Scrutiny Board.	We acknowledge the Commission's existing scrutiny procedures and are glad to provide an additional contribution.
A think tank working on EU policy	The definition of non-personal data is absolutely crucial. Not defining will implicitly lead to very far-reaching restrictions, which limit the social and economic potential of data. This also makes this far from future-proof as the distinctions are likely to continue to blur.  You judge the assumptions, analysis etc. as rather poor but the conclusions as basically sound. If the analysis and its assumptions are flawed, there is no way of knowing whether the conclusions are sound	The key terms, including non-personal data are in fact defined, but not sufficiently prominently to provide clarity for the interested stakeholder. This is clarified in the text.  We have clarified this issue in parts of the text, showing that the evidence is available to support the policy options, but is complemented by further assertions that lack coherence, whereby these do not negate the relevant evidence.
An NGO active in the domain	You logically cannot say that the conclusion is valid if dissenting data are not acknowledged, if the definitions are unclear, if the consultation is misrepresented, if the various options are not correctly assessed and if all options have not been properly assessed.	As indicated above, the valid evidence is complemented by less robust analysis, which weakens the quality of the impact assessment but does not detract from the main conclusions.
A company active in the domain	Even though the study mentions that the IA's shortcomings do not undermine the validity of the IA and the legislative proposal, the statements could still indicate that conclusion.	Again, as indicated above, as well as evidence that demonstrates a benefit from the policy, additional data, analysis and methodological errors weaken the message. We have clarified our intended meaning in the text.